

**EXHIBIT F**  
**Part 2 of 2**

[illegible]

CalApp 4th at pp. 891-892, 15 CalRptr 3d 32.)

*Enlightened the Murderer Was Dispositioned on Calapp 4th.*

[10] Section 24021 subdivision (c)(1)(B) describing a factor that can support a finding the crime was committed in an especially heinous, atrocious or cruel manner provides that the offense was only carried out in a premeditated and calculated manner. Shaputis contends there is no evidence to support this finding. The BPPs only refer to the "evidence supporting this finding was again to note the manner of the death (e.g., the victim died from a single gunshot wound fired at close range while propped up in a chair, spinal cord injury and spinal cord injury)." The same report from which this manner of death was drawn also noted Shaputis was an alcoholic who became violent when "drunk and, the had been drinking the night of the shooting." Moreover, the made no attempt to conceal the crime or the weapon, but instead called police and surrendered within 90 minutes of the shooting and appeared in court when interviewed by police, that might be evidence of a guilty conscience.

The BPP's finding that Shaputis acted in a premeditated and calculated manner in the killing is not supported by the evidence.

11. The forensic psychological evaluation stated Shaputis and his wife were both drunk and arguing immediately before the shooting. The evidence at Shaputis's trial showed the victim had a blood alcohol level of .072 and Shaputis, when tested some six hours after the shooting, still had a blood alcohol level of .041. (*People v. Shaputis*, supra, 20015507 at p. 32.)

12. BPP asserts there was other evidence supporting this finding. For example, BPP notes it was undisputed Shaputis was an alcoholic. However, it does not appear substance abuse (standing alone) can support a finding of a premeditated, atrocious or cruel manner. Shaputis's alcoholism is only genuine insofar as it was a contributing cause of his unstable

addition to being inconsistent with the jury's verdict acquitting him of first degree murder. (*cf. Scott*, supra, 7119 Cal App 4th at pp. 889-890, 15 CalRptr 3d 32.)

is unsupported by (and indeed may be irreconcilable with) the evidence on which BPP purported to rely. Accordingly, the BPP's reliance on this factor was arbitrary and capricious. (*Scott*, pp. 891-892, 15 CalRptr 3d 32.)

13. BPP also asserts that the evidence supported the finding that Shaputis had a "history of unstable" relationships with others. The only other finding cited by the BPP to support this prognostication that Shaputis posed an unreasonable risk to danger to society after release on parole was that he had a history of unstable and tumultuous relationships with others. However, the evidence showed that he reversed (despite his mother's rejection of the family) and stopped parenting his siblings until he left home to begin his adult life. He thereafter maintained relationships in his occupational endeavors, and continued to be in contact with his mother, even after he was imprisoned for a period of time. (*People v. Shaputis*, 107 Cal App 4th 551, 559-561, 24 CalRptr 3d 643.) BPP also asserts Shaputis's departure from his siblings (after he left home to begin his adult life) and the absence of any siblings with his daughters (since his imprisonment) is evidence he has "troubled" relationships. However, the complete absence of any relationship between Shaputis and his siblings necessarily precludes that relationship from being either tumultuous or unstable. Similarly, the fact Shaputis's daughters shunned him after he was imprisoned is, at best, inconsistent with a finding that such relationships were either tumultuous or unstable.



[illegible]

There is no current desire for hearings and that there is little support for the possibility of drug relapse, let alone a return for violent conduct as a result of it. Moreover, the Governor's conclusion that Smith currently is not a pose, although a reasonable risk of violent criminal conduct is released without further drug treatment appears to be a sound one and appropriate, because, as noted in his decision, Smith's disposition of, or even relapse to, the undisputed evidence noted above. In this regard, we point out that in *Rosen v. Brown*, the court stated that to ensure due process, the Governor's decision must reflect the consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards. Following *Smith v. Williams*, 295 Cal.3d at p. 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 13



[illegible]

sustain a conviction for that offense." (*Id.* at p. 688, 128 Cal.Rptr.2d 104, 58 P.3d 174).

In *one*, *Damenborg*, (2005) 34 Cal.4th 1067, 23 Cal.Rptr.3d 417, 104 P.3d 788 (*Damenborg*), further clarified the applicable standard under which the Board of Prison Terms fixes parole release dates for those imprisoned for indeterminate terms. It held that the Board, exercising its traditional broad discretion, may protect public safety by each discrete case-by-case consideration of the dangerous implications of a life maximum prisoner's crime individually. While the Board must point to factors beyond the minimum elements of the crime for which the inmate was committed, it need engage in no further comparative analysis before concluding that the particular factors of the offense make the inmate's release "a danger to the public." (*Id.* at p. 1071, 23 Cal.Rptr.3d 417, 104 P.3d 788 (italics omitted)). The court rejected the argument that 1992 an indeterminate life prisoner reaches the minimum parole eligibility date; the board must fix a date of potential release unless it finds the prisoner's crime particularly egregious in comparison with other offenses of the same class. Instead, the court held the board may decline to set a parole date in any individual case. "If it concludes, on relevant grounds with support in the evidence that the grant of a parole date is detrimental for reasons of public safety," (*Id.*).

Clearly, if an inmate is not suitable for parole, because considerations of public safety demand a more lengthy period of incarceration, the Board of Prison Terms is not required to set a release date. Our review of the board's decisions is highly deferential and only a modicum of evidence is needed to support the board's decision.

(*Turner-Roschekman v. supra*, 29 Cal.4th 416, 671 P.2d 830, 1983 Cal.Rptr.2d 404, 159 P.3d 474.)

This deference is based on two important considerations: first, we are reviewing the discretionary actions of a separate branch of government; and second, the board has the greater expertise and experience in dealing with determining public safety from the courts.

With these considerations in mind, there is certainly a modicum of evidence to support the denial of parole in this case.

The board gave two general reasons for concluding petitioner is an unreasonable risk to danger to society or a threat to public safety if released from prison. The first was the cruel and callous manner of the murder petitioner committed and the second was petitioner's history of unstable and "tenuous" relationships with others.

What clearly concerned the board, the district attorney, and the prison psychologist who evaluated petitioner, was his long history of alcoholism and the physically abusive behavior in which he engaged when drunk. The crime here, which my colleagues emphatically refer to as "alcohol-fueled murder," distinguishes petitioner from P. 333, consisted of petitioner shooting his wife in the neck at close range, killing her instantly. He then followed domestic violence over the course of years, consisting in part of routine beatings, cracked ribs and a possible assault where petitioner shot at her and missed. The underlying cause of the murder and previous violence was petitioner's drinking.

As one might expect, and as my colleagues emphasize, when petitioner is away from prison, he is a model inmate. His prison disciplinary history at the time of the hearing was spotty. He had done well. The crucial discretionary task, however, was to make a prediction of his behavior outside the highly structured and restrictive setting of prison. The psychologist who evaluated petitioner, qualified his conclusion that petitioner would be released by petitioner



[illegible]

## NEW-YORK: TIVESTOCK &amp; SUPERIOR CO. 1877.

Cite as 37: Cal Btr 3d 338 (Cal App 2 Dist 30051)

[illegible]

7. Ground 2 or Ground \_\_\_\_\_ (if applicable):

SEE ATTACHED

a. Supporting facts:

SEE ATTACHED

b. Supporting cases, rules, or other authority:

SEE ATTACHED

GROUND 2. THE BPT'S REPEATED RELIANCE ON THE CRIME AND BEHAVIOR LEADING UP TO THE CRIME TO FIND PETITIONER UNSUITABLE FOR PAROLE VIOLATES THE STATE AND FEDERAL DUE PROCESS.

#### INTRODUCTION

Our Supreme Court has made it clear that parole consideration must be guided in large measure on post-conviction history. The Court explained that a court presented with a habeas corpus petition, should examine the proceedings before the Board and ascertain whether the Board's factual determinations are supported by "some evidence."

#### FACTS

In this case, the Board concluded that Petitioner "is not suitable for parole and would pose and unreasonable risk of danger to society or a threat to public safety if released from prison [for the FOURTH TIME]. We are going to deny your parole for three years, sir, and I'm going to tell you why. The offense in this case was particularly cruel and callous absolutely no motive. There was no reason for this offense to have occurred. It was certainly carried out in a dispassionate manner. I [] wouldn't go as far to say it's an execution-style, sir. I would certainly say it's more than unintentional act or more than an accidental death given your history as a Marine around firearm, I just find -- I do not understand how this could have happened. If these wasn't -- without retrying this case at all you are here for second degree murder. I think there was certainly a crime of passion. We think it's a crime of passion. On the evening of March 26, 1988, at approximately 11:30 p.m. your wife Alma age 23-years-old was shot to death by you over an incident that should have never escalated to clearly over that point." (Exhibit A, HT, Page 98)

Petitioner's minimum eligible parole date was April 30, 2000. His initial hearing was scheduled for August 23, 1999. However, it was postponed to the next available calendar due to recusal by Commissioner Giaquinto, who was a member of the same police department as Petitioner.

On December 14, 1999, the Board denied parole for three (3) years based solely on the nature of the crime. The panel's recommendations were to "remain disciplinary free, participate in self-help and therapy."

On December 6, 2002, Petitioner appeared before the Board for his first subsequent hearing. The Board denied parole for one (1) year. The panel's recommendations again were remain disciplinary free, participate in self-help and therapy. The Presiding Commissioner also stated that although the current Psych report prepared by Dr. Bakeman indicated that Petitioner had a very good record while in the controlled setting of the prison, was not normally violent, and did not seem to have an anger problem, the report did not predict what sort of threat Petitioner would pose if released to the community.

Petitioner's second subsequent hearing was scheduled for December 12, 2003. However, it was not held until May 18, 2004, approximately 5 months later. Again, the Board denied parole for one (1) year. A new Psych report was provided as requested by the December 6, 2002, panel. The report was prepared by Dr. Macomber. Dr. Macomber reported that, "[a]t this point in his life, his potential for violence in the unstructured setting of the community is definitely below



average in comparison to other inmates. In comparison to the average citizen in the community and based upon his knowledge and experience, his potential for violence is even lower than that." Petitioner remained disciplinary free, continued his involvement in self-help and therapy. Yet, the Board denied parole for one (1) year based on the commitment offense.

On December 6, 2005, Petitioner appeared before the Board for his third (3) subsequent hearing. As stated above, the Board denied parole for three (3) years. Again, the decision was based on the commitment offense. Upon hearing that he was denied 3 years, Petitioner respectfully asked to be excused from the hearing. This was the fourth panel that determined that Petitioner, "is not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison." The determination included, "[t]he offense in this case was particularly cruel and callous ... it was carried out in a dispassionate manner."

The 2002 panel (Presiding Commissioner Angele and Deputy Commissioner Johnson); the 2004 panel (Presiding Commissioner Welch and Deputy Commissioner Garner-Easter); and, the 2005 panel (Presiding Commissioner Sawyer and Deputy Commissioner Mitchell) all had before them the same documents and information received from the public regarding Petitioner not having any prior criminal history as well as his post-conviction gains.

Presiding Commissioner Angele (2002 panel) stated:

"No matter what we do today you'd have more time to serve. You've done an outstanding job as far as self-help and therapy programming while in custody. There is a question in regards to your temper. That may be explained away one way or another, but what happened that day that you shot your wife, obviously, would indicate to me that there is some sort of a problem. I'd like to see that maybe addressed a little bit more in the next psychological evaluation also. And also for them to place a degree of threat on you. They didn't bother doing that for some reason or another. And once we get that I think it will be helpful also. Like I said, this is for a period of one year and we expect you to keep on doing what you're doing, and I just wish you the best of luck."

Presiding Commissioner Welch (2004 panel) stated:

"The Board reviewed all information ... and relied on the following circumstances in concluding that the prisoner is not suitable for parole and would pose an unreasonable risk of danger to society or threat to public safety if released from prison. One, the offense was carried out in an especially cold hearted or cruel manner. The offense was carried out in a dispassionate manner. The motive for the crime was inexplicable."

Yet, earlier in the hearing Deputy Commissioner Garner-Easter noted:

"The latest psychiatric report was dated August 11th of 2003 and it's by Melvin Macomber. Dr. Macomber thoroughly reviews your record and again goes over many of the factors that the Board has already looked at. So I will just go to diagnostic impressions on page one, he says basically that there are no clinical disorders, personality disorder



or physical disorder. So no mental health issues or any of that. He concludes in his report on page three by stating he feels you have matured and that you're no longer driven by the perfectionist tendencies to control your life and that you've learned to negotiate differences with others and come to a positive resolution. After he's talked to you he says he feels like you have a good sense of concern and empathy toward others at this point in his life. His potential for violence in the unstructured setting of the community is definitely below average in comparison with other inmates. In comparison to the average citizen in the community, based upon knowledge and experience, his potential is even lower than that."

Presiding Commissioner Sawyer (2005 panel) states:

"Several issues as to why we determine three (3) years. We were really wrestling and we were really -- we really had a problem with his minimalization [sic] in this first of all. He appears to be attempting to word smith this crime by chang[ing] his description of this from accidental to unintentional act. Those are very far apart. His version of this changing the words from angry and infuriated downsizing those words for a lack of better term to upset referring to them as upset, which makes him look a little better a little nicer. Another issue that we felt he is not taking responsibility for this particular crime, which until he takes responsibility for this crime I don't think he'll -- or at least this panel won't receive a date but his honesty to his wife Cathleen as soon as I -- as soon as he said she didn't know -- Ms. Hall, Rosy Hall down in San Diego didn't know that she was a part -- that he had not told Cathleen that Ms. Hall was part of his plan and if he got paroled to Morro Bay he would never disclose that. I think that's deception. The psychiatric report in this case is -- has been invalidated by the fact that he told the psychiatrist that he had never to quote. Agrio he said some things here that just totally not taking responsibility. He may have mishandled the situation stress of being married to a wife who had a drinking problem and would not listen to her attempts to talk. She would not listen to his attempts to talk to her in a mature manner. He is making her fault. He's putting the monkey on her back. His statement that he never battered his wife was a totally. And I think there is something to say about the fact that he didn't want to hear the truth here and didn't want to face the facts and left the hearing prematurely. The reason -- one of the reasons that people in law enforcement and people with experience with domestic violence know it happens all the time, and that is when a woman is battered police are called, she calls them as the right thing to do, and then as soon as things settle down then she recants and that's what appears to have happened here when the internal investigation was taking place, she backed off because she's going to lose. If he loses his job or gets suspended then she's going to lose. If he gets convicted of battery then she's going to lose and so I mean this is typical where the spouse backs off. I think he was -- the most honest I think he was to us here today ot to the system was the statement that I read earlier that he had made in 19 or -- or May 31, 1989, when he analyzed the cultural terms of a latin family where a man

is the boss of the house and ordinarily the wife jumps at the snap of a finger. He indicates that today's younger people are not traditionalist in an attempt to explain his position. He states that no matter how much time he has to do, there's no guarantee that he would not ultimately wind up in a similar position under similar circumstances. I think he's right on. I think he's right on, and if you study cultures you know that some cultures a lot of cultures have their cultural things sometimes in different cultures you have to break those. From those -- those are the reasons that we -- that we're giving him for this multiple year, three year denial." (Exhibit A, HT, Pages 98-106)

#### CONCLUSION

The Board's repeated use of the offense as justification for parole denial essentially "resentences" Petitioner to "Life Without the Possibility of Parole" in that the factors are immutable.

Therefore, Petitioner most respectfully requests an order from this Honorable Court for a re-hearing of the 2005 suitability hearing without a re-hash of previously decided issues absent new information.

Additionally, that the order include directions to the Board to adhere to the guidelines set forth in the regulations regarding factors that tend to show suitability vs. factors that tend to show unsuitability as they apply to the requirements codified in Penal Code section 3041.

Note: Tom Sawyer, the Presiding Commissioner at Petitioner's hearing, is no longer with the BPT. He resigned from the BPT prior to Senate confirmation hearings.



**GROUND 3. THE SAN DIEGO SUPERIOR COURT AND THE 4TH APPELLATE DISTRICT HAVE VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AND HAVE DISCRIMINATED AGAINST PETITIONER BECAUSE OF HIS RACE. BOTH COURTS HAVE CONSISTENTLY RE-PROSECUTED PETITIONER'S CASE AND HAVE FAILED TO CONDUCT AN EVIDENTIARY HEARING TO ESTABLISH TRUE FACTS, AND THE NATURE OF THE EVIDENCE USED BY THE BOARD TO CONCLUDE THAT PETITIONER POSES A CURRENT RISK OF DANGER.**

As indicated in GROUND 1 of this writ, the circumstances of Petitioner's offense are similar to those of the petitioner in In re Shaputis, supra. The 4th Appellate District granted relief to Shaputis, a White man, but denied relief to Petitioner, a Hispanic man. The 4th Appellate District states that Petitioner cannot use In re Shaputis because this case was ordered de-published by this Court on May 17, 2006. Petitioner is confused.

Petitioner appeared before the Board on December 5, 2005. Shaputis was decided and published on December 28, 2005. (A nice Christmas present for Mr. Shaputis and his family). Petitioner did not receive his hearing transcript until about 45 days after the hearing. Thereafter, he quickly filed a writ in the San Diego Superior Court relying on Shaputis. As is customary, the Superior Court proceeded to deny the writ by stating, inter alia, that Shaputis was not on point. (See attached ORDER). On May 17, 2006, while Petitioner was preparing his writ to the 4th Appellate District, this Court ordered Shaputis de-published.

California Rules of Court, Rule 977(b), allows for exceptions to the rule of not citing de-published opinions. When the opinion is relevant under the doctrine of law of the case, etc., and a copy of the opinion is furnished to the court, the court must consider the opinion. The 4th Appellate District knows this but failed to do their job. [See People v. Stanley (1995) 10 C.4<sup>th</sup> 764 – Law of the case. An appellate decision in a case usually binds the parties, even though it is not published. For example, if a review court renders a decision concerning a petition for a writ, that decision becomes the law of the case. People v. Veitch (1982) 128 CA3d 460 – Summary denial of a writ petition, however, has no res judicata effect. People v. Durrett (1985) 164 CA3d 947 – The law of the case doctrine also applies to other reviewing courts concerning the same case unless adherence to the doctrine would result in an unjust ruling.]

Petitioner has been experiencing this kind of bias and discrimination with San Diego courts since he first filed against the Board for violating his due process rights. Petitioner doesn't understand how the 4th Appellate District was able to grant Shaputis relief, but not Petitioner. Was it because Shaputis had a lawyer and Petitioner is pro se? Is it because Shaputis is White and Petitioner is not? And why was the opinion de-published?

Mindful of the bias scrutiny he has been receiving, Petitioner filed peremptory challenges against 4 judges of the 4th Appellate District. Petitioner's concerns were ignored. (See attached ORDER). Instead, the 4th Appellate District proceeded to take "judicial notice" of their own decision on the direct appeal of this case. What is the relevance of that decision in connection with the claims against the Board? How does that decision justify what the Board did or did not do? The law and numerous court decisions have clearly established that the Board is supposed to be looking for evidence that Petitioner is a **current** threat to society if released from prison. That means today, now – not some 20 years ago.

Petitioner is certain that there exists a conspiracy on the part of San Diego law enforcement types to convert Petitioner's sentence from 2nd Degree Murder to First Degree

Murder. This is unconscionable! Courts have consistently ruled that at some point the commitment offense can no longer be used to justify denying parole.

Petitioner cannot help but to be frustrated with the constant mischaracterizations by the Board and the San Diego Courts of his testimony, all intended to further the conspiracy of violating his constitutional rights. For example:

**DECEPTIVE PAROLE PLANS:** Petitioner's current wife resides in Morro Bay. She is a long time resident of the area and was there when Petitioner appeared before the Board for his initial hearing. Petitioner made it clear at that time that he intended to live with his wife if granted parole. The Board denied parole and requested that Petitioner provide parole plans for San Diego at future hearings. Petitioner then contacted his old roommate from his days with the Marines and secured her support as an alternative parole plan. Now the Board says that petitioner has "deceptive parole plans" because he did not share this with his wife. The truth is that Petitioner does not want to return to San Diego. He never did. Petitioner was just trying to satisfy the Board's requirement. Petitioner does not understand the games the Board plays. Petitioner's wife does not care where Petitioner paroles to as long as he is free. Petitioner's wife is 67 years old for Christ sake! And guess what? The Board still stated at this hearing that they required parole plans for San Diego. Is that nuts or what? If what Petitioner presented is not acceptable then what is Petitioner to do?

**RESPONSIBILITY FOR THE CRIME:** Petitioner has stated over and over that he takes full responsibility for the offense and expressed remorse from the time of his arrest. Yet, when he states the facts as they are, the Board claims he is blaming the victim. Nonsense! What is Petitioner supposed to do? Ignore the facts and the evidence, as only he knows them? That cannot be. Truth is truth. Facts are facts.

**PSYCHOLOGICAL EVALUATION:** The Board and the Courts now say that the outstanding psychological evaluation by Dr. Macomber is invalid because Petitioner failed to reveal an alleged incident of spousal abuse. This is ridiculous. During a domestic dispute, initiated by Petitioner's wife, a scuffle took place. When Petitioner left the house, his wife called the police and made false allegations in a moment of ire. She later retracted those allegations and stated so to investigators. Petitioner has never viewed this incident as any spousal abuse, and quite honestly did not have a present recollection of the incident at the time he was interviewed by the psychologist, and was ignorant of the perception until the San Diego District Attorney brought it up at the December 2005 trial. What is ludicrous about this is that these evaluations are not based solely on what Petitioner says to the mental health professional. They are based on his/her observations, a review of the record, previous evaluations, personal experience as a psychologist, and so on and so forth. It is impossible to relate to the psychologist every aspect and detail of one's existence during the one hour interview usually allotted to these evaluations. One omission does not in itself invalidate the professional assessment made of future dangerousness. What about age, maturity, and all the therapy Petitioner has undergone over the past 15 years? And incredibly, the Board did not request a new psych evaluation. How about that?



THE COURTS HAVE FAILED TO COMPARE PETITIONER'S OFFENSE WITH THAT OF OTHER OFFENDERS WHO ARE NOW FREE: Again, the San Diego Courts continue to rehash Petitioner's trial. They have not taken into account offenders like Rosenkrantz [premeditated murder masquerading as second degree], Wen Lee [multiple victims], and Jeffrey Elkins [first degree murder/robbery with a baseball bat]. All these men are now free. What about the time served? When will that come into play? And why are the San Diego Courts considering trial testimony that was not presented to the Board? The Courts must look for what evidence of **current threat** the Board cited to justify denying parole. There is none. All the factors tending to show suitability were met.

PETITIONER LEFT THE HEARING ABRUPTLY BECAUSE HE DID NOT WANT TO HEAR "THE TRUTH": How convenient. Petitioner left the hearing abruptly because he could not believe he was being denied parole for 3 more years in spite of his record as a model prisoner, and the rumors floating around the penitentiary that the Board was denying multiple years in an attempt to reduce the backlog of hearings. This issue had been brought to the attention of a Marin County Superior Court in a class action lawsuit known as In re Rutherford, with the Prison Law Office as attorney of record. (See attached update) The Marin County Superior Court later confirmed and ruled in plaintiffs favor and ordered that the Board could not deny multiple years after a one-year denial. But the damage was done. Petitioner was denied 3 years at his initial hearing in 2000. His two subsequent hearings resulted in one-year denials. Now the Board was telling Petitioner that instead of getting closer to being released he was farther along even though his record had improved over the years. Needless to say, Petitioner found it difficult to digest this. His attorney asked him if he wanted to leave and he assented. Petitioner's attorney interrupted the reading of the decision and informed the Board that Petitioner wanted to leave. The commissioner gratuitously commented that Petitioner wanted to leave because he did not want to hear "the truth." What truth? That he had just retried and re-sentenced Petitioner for the 6th time. And to add injury to insult, this commissioner is no longer working for the Board.

Petitioner is an indigent litigant. He provided the San Diego Courts with an extensive record of what was available to the Board at the 2005 hearing. The copying of these documents was a tremendous expense. Petitioner does not have the funds to duplicate that record all over again. Petitioner is requesting that this Court order the entire record of the case transferred from the 4th Appellate District to this Court for a comprehensive review of these claims. Petitioner is not a lawyer and may not have presented his claims properly but he does aver and believe in his heart that he is being discriminated against and that the San Diego Courts are bias against him. **The fact of the matter is that In re Shaputis was a published decision when Petitioner's writ was being considered by the Superior Court.** Petitioner had no way of knowing that forces beyond his control would fight to keep that decision in house and prevent others from benefiting of the gift to the White petitioner. Petitioner respectfully requests that an order to show cause be issued and that counsel be appointed to represent him in these proceedings.

UNCOMMON LAW  
 1300 CLAY STREET, SUITE 600  
 OAKLAND, CA 94612  
 (510) 350-8787  
 (510) 350-7176 (FAX)

KEITH WATTLEY  
 THOMAS MASTER

February 2007

This is an update about the case involving overdue parole consideration hearings and some other problems lifers experience with the parole consideration process. That class action lawsuit in Marin County Superior Court is called In re Rutherford (Case Number SC 135399A). Since Mr. Rutherford passed away earlier this year, the Court substituted Inez Tito Lugo as a class representative. (The case is sometimes now called In re Lugo.) If you are a lifer who has served enough time to be eligible for parole, you are automatically included in the class. You don't have to do anything to join. The Court has ordered the Board of Parole Hearings (BPH) and the CDCR to make certain changes and eliminate the backlog of overdue parole hearings. The Court has also ordered that prisoners cannot "opt out" of the class. Although the Rutherford case does not necessarily require the Board to provide every lifer's hearing right away, we can bring certain cases of extreme delays or misconduct to the Board's attention and ask that those problems be addressed (and a hearing scheduled) as soon as possible.

Every Rutherford class member should have already been provided with his or her own copy of the Notice of Judgment in this case. In addition, these notices should be posted in housing units, law libraries and other areas throughout the institution. The highlights of the case are explained on the backside of this page.

The Rutherford Court often holds hearings to get an update about the Board's progress in eliminating the parole hearing backlog, and to hear from us about most other issues in the case. Set forth below are some of the biggest issues. If you have any additional information regarding these issues, please let us know. Since there are nearly ten thousand Rutherford class members, we cannot always respond to individual letters, but we do keep track of all the information provided by class members so that we can inform the Court of the ongoing (or the new) problems, and so that we can advocate for class members in cases of extreme delays or misconduct.

#### Hearing Transcripts

We have made the Rutherford Court aware of the extreme delays in processing transcripts from parole hearings. Apparently, the delays were related to some problems with the company hired to transcribe the audiotapes from hearings. The Board now reports that they have hired several additional transcribing companies to catch up. The Board also reported that they would be up-to-date on providing transcripts by the end of January 2007. The Court also ordered the Board to provide prisoners with the transcript from any scheduled hearing that results in a postponement, waiver, or stipulation. Prisoners should not have to request these transcripts; they should be provided automatically – in the same manner they provide transcripts for full hearings.

#### Multiple-Year Denials

The Court ordered that the Board cannot issue a multiple-year parole denial at a hearing immediately following a one-year denial unless there is some significant change in circumstances to justify the increased denial period. The Board appealed that order. The Court of Appeal has issued a stay of the order, meaning it will not be enforced until after the Board's appeal on this issue has been decided, which will take several more months. In the meantime, we want to hear from people who have been denied for two or more years in the hearing immediately following either a one-year denial or a parole grant.

#### Stipulations and Postponements

We continue to hear from lifers that the Board is encouraging them to stipulate to being unsuitable for parole or to postpone their hearings for no good reason. Please let us know if this has happened to you, and include details about who encouraged you to stipulate or postpone, when, where and why. Also, if the discussion regarding a stipulation or postponement took place during the week of your scheduled hearing (as opposed to an earlier time), that discussion must be recorded.



8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes. ☐ No. If yes, give the following information:
- a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"): \_\_\_\_\_
- b. Result: \_\_\_\_\_ c. Date of decision: \_\_\_\_\_
- d. Case number or citation of opinion, if known: \_\_\_\_\_
- e. Issues raised: (1) \_\_\_\_\_  
(2) \_\_\_\_\_  
(3) \_\_\_\_\_
- f. Were you represented by counsel on appeal? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known: \_\_\_\_\_
9. Did you seek review in the California Supreme Court? ☐ Yes. ☐ No. If yes, give the following information:
- a. Result: \_\_\_\_\_ b. Date of decision: \_\_\_\_\_
- c. Case number or citation of opinion, if known: \_\_\_\_\_
- d. Issues raised: (1) \_\_\_\_\_  
(2) \_\_\_\_\_  
(3) \_\_\_\_\_
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
11. Administrative Review:
- a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.  
Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes. If yes, continue with number 13. ☐ No. If no, skip to number 15.

13. a. (1) Name of court: \_\_\_\_\_

(2) Nature of proceeding (for example "habeas corpus petition"): \_\_\_\_\_

(3) Issues raised: (a) \_\_\_\_\_

(b) \_\_\_\_\_

(4) Result (Attach order or explain why unavailable): \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

b. (1) Name of court: \_\_\_\_\_

(2) Nature of proceeding: \_\_\_\_\_

(3) Issues raised: (a) \_\_\_\_\_

(b) \_\_\_\_\_

(4) Result (Attach order or explain why unavailable): \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

\_\_\_\_\_  
\_\_\_\_\_

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

\_\_\_\_\_  
\_\_\_\_\_

16. Are you presently represented by counsel? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known:

\_\_\_\_\_  
\_\_\_\_\_

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☐ No. If yes, explain:

\_\_\_\_\_  
\_\_\_\_\_

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

\_\_\_\_\_  
\_\_\_\_\_

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

2/25/07



(SIGNATURE OF PETITIONER)